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AUG 19 1963
JOHN F. DAVIS, CLERK

No. 388

In the Supreme Court
of the United States

HERBERT C. BARKER and
ELIZABETH S. BARKER,
husband and wife,

Appellants,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
a corporation,

Appellee.

On Appeal from the Supreme Court of the State of Oregon

JURISDICTIONAL STATEMENT

HERBERT C. BARKER and
ELIZABETH S. BARKER,
5278 S. E. Hillwood Ave., Milwaukie 22, Oregon,
Defendants-Appellants in Propria Persona.

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Oregon entered on January 22, 1963, affirming the Decree of Foreclosure and Deficiency Judgment, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Oregon is reported in 75 Oregon Advance Sheets 797, and is attached hereto as Appendix A. There was no opinion given by the Circuit Court of Clackamas County, State of Oregon.

JURISDICTION

This is a suit in equity to foreclose on real property which also sought a deficiency judgment. The Judgment of the Supreme Court of Oregon was entered on January 22, 1963, and a timely Notice of Appeal was filed in that Court on April 1st, 1963. The Jurisdiction of the Supreme Court to review the decision by direct appeal is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Rogers* v. *Alabama*, 192 U.S. 226.

QUESTIONS PRESENTED

1. Whether, it is a matter of ethics or of law, and whether the Court's ruling that it lacked authority to prevent and restrain an attorney from representing an adverse interest to a former client on the very same matter the attorney was originally retained to defend, denied appellants equal protection and due process of law.

2. Whether the use by opposing side of appellants' own attorney who had received the trust and confidence of the appellants on this very same matter, so far deprived him of a fair trial as to have denied him due process.

3. Whether the instructions by the Court to the appellants not to present any evidence of the prior relationship with the plaintiff's attorney and the subsequent refuting of their defense for lack of supporting evidence so far denied them a fair trial as to have denied them due process of law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Constitutional provisions basically involved are the Due Process and Equal Protection Clauses of the Fourteenth Amendment: No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any state deprive any person of life, liberty, or property, without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

This is a suit in equity to foreclose on real property and which also sought a deficiency judgment.

On or about April, 1955, Mr. William Saari purchased the real property at issue by borrowing approxi-

mately $14,900 from Dean Vincent Inc, of Portland, Oregon, secured by a mortgage on said property and on October, 1955, appellee hereafter referred to as Metropolitan Life Insurance Co., purchased the contract from Dean Vincent Inc. On or about April 1959, appellant attempted to purchase said property from the Saaris. An earnest money offer (Exhibit No. 6) was signed only by Mr. Herbert C. Barker, appellant, which was the only document ever signed by the appellants. After the transaction was apparently closed a dispute arose and the Saari's agent, (Kronberg Brothers Real Estate) refused to deliver the deed and title to the appellants (Tl. Tr. 45-46). Whereupon appellants went to their attorneys, Mautz, Souther, Spaulding, Kinsey & Williamson, who advised the appellants that they (Mautz, etc.) would handle the matter and advised appellant to start making payments to Dean Vincent, which appellants had refused to do without delivery of the deed. The law firm of Mautz, etc. kept the appellants' file in this transaction in their office (Tl. Tr. 76-80) and sent a bill to the appellants for the service done in regard to the matter of the deed, which appellants paid. (Reply to Answer to Petition for Instructions). After one year and still without delivery of the deed and title appellants stopped making payments after discussing the matter with their attorneys Mautz, etc. A month later a dispute arose between appellants and their attorneys Mautz etc. concerning their irregular handling of another case of the appellants. The lawfirm of Mautz etc. returned most of the file of the appellants including the file on the real property. A month

later appellants discovered that the same law firm of Mautz etc. had been retained by Metropolitan Life Insurance Co., to handle foreclosure on the real property. When appellants protested to Mr. Souther about this, (Tl. Tr. 3-4) appellants were assured that the law firm of Mautz etc. would not handle the foreclosure, however instead the law firm of Mautz etc. filed a motion resigning from representing the appellants in another case and changed the date (R. Complaint, Tl. Tr. 4) of the verification and filed the complaint against the appellants. Appellants after some difficulty were able to get Mr. Hawkins, a lawyer, who agreed to represent them. When Metropolitan refused appellants' offer to quit claim the property (R. Respondents Brief 3) but insisted on seeking a deficiency judgment. Mr. Hawkins refused to make an appearance for the appellants which appellants had to do themselves (R. Answer) without the aid or advice of counsel in order to prevent a default. Mr. Hawkins refused (Tl. Tr. 33-34) to return the file to the appellants without their signing a letter (Exhibit D) which the appellants thought would be damaging to them. Appellants refused to sign this letter and were only able to get their file back just five days before trial was set. Appellants were not represented or advised by counsel at any time in this case since their second attorney Mr. Hawkins refused to put in an appearance for them (Tl. Tr. 33-34). Appellants went to trial and have appealed their case through the Oregon Supreme Court and finally to the Supreme Court of the United States without any advice or benefit of counsel, despit their consistent, continuous efforts to obtain

counsel. Appellants have complained (Tl. Tr. 3) and contend that they have not been able to get an attorney to defend them because of the fact that the senior member of the firm of Mautz, Souther etc. is on the Board of Governors and is also very influential in politics in Oregon (R. Appellants Abstract of Record and Brief 15). Appellant has only gone through the first year of high school. Appellant's wife was born and raised in Holland and has only been in the United States for eight years.

HOW THE FEDERAL QUESTIONS ARE PRESENTED

Before the trial started (Tl. Tr. 3-4) appellants objected to plaintiff using appellants' own attorney against them in the very same matter they had been retained to represent. The Trial Judge ruled that it was a matter of ethics (Tl. Tr. 7-8) rather than law and that the Court had no authority to act. When Metropolitan had rested their case (Tl. Tr. 63) appellants again objected to the use of their own attorney against them and were reminded by the Court of its previous ruling (Tl. Tr. 63).

When appellants were about to present their defense, appellants were instructed (Tl. Tr. 70) by the Court not to present any evidence of the prior relaship between appellants and plaintiff's attorneys.

On June 21, 1961, appellants filed a motion (R. Motion for New Trial) giving the above as some of the reasons.

On July 3, 1961, an order was entered denying the

motion. In appellants Brief to the Supreme Court of Oregon these errors were again raised (R. Appellants' Abstract of Record and Brief, Error No. 3). The Supreme Court of Oregon in their decision of December 31, 1962, ruled that appellants rights to a fair trial were not violated.

THE QUESTIONS ARE SUBSTANTIAL

This case revolves around one basic question—the propriety of attorneys representing an adverse interest to a former client on a matter related to what they were originally retained to defend, and the Court's authority to prevent such happenings.

1. The Trial Court ruled three different times that it lacked such authority. The first time (Tl. Tr. 7-8).

> "THE COURT: May I ask you this question? Do you and the members of your firm feel there was no conflict of interest at the time of the filing of this suit?
>
> MR. THOMPSON: We are satisfied and Mr. Mautz and Mr. Souther are very familiar with the situation.
>
> THE COURT: Mr. Moore was not representing Mr. Barker according to you, at the time that this suit was filed?
>
> MR. THOMPSON: That is my honest contention.
>
> THE COURT: This is a matter of ethics rather than a matter of law.
>
> MR. THOMPSON: That is right, and a complaint has been filed with the Bar Association by Mr. Barker and the Bar Association has refused to take any action.
>
> THE COURT: Mr. Barker?

MR. BARKER: Your Honor, I —

THE COURT: I don't believe this is a matter of law that the Court can decide in this particular case. The only thing this Court can do is rely on the officers of the Court as attorneys who appear before it as to whether or not there is a conflict of interest exists. If you contend that there is, and you have filed a complaint with the State Bar Association, regarding this matter, then that is the proper place for the question to be settled."

The second time (Tl. Tr. 63) the Court said:

"Now, as far as the issue regarding the relationship of this firm with you, I have previously stated that I don't think that I can in this case, make any ruling affecting the outcome of this case based upon the contention that they were representing you at the same time they were representing the plaintiff."

And finally when the Court was instructing the appellants when it was time to present their defense (Tl. Tr. 70) the Court:

"Now, you have an opportunity at this time to present any evidence to the Court that you desire. Are there any other witnesses beside yourself that you desire to call? I am not concerned with any evidence here regarding the fact that this firm may have represented you at the time it was called, I don't think this is for the Court to decide. I will concede if you will call witnesses you might be able to prove it. I don't know. I can see if you did prove it to the Court at this time would be powerless in this suit to take that into consideration."

Appellants contend that the Court's possess the authority and is supported by *Porter* v. *Huber*, 68 F. Supp. 132, quoting with approval from Am. Jur. Attorney-

Client p. 296 "that it is not only the right but the duty of the Court to restrict and restrain an attorney" and also in *Wilson* v. *State*, 16 Ind. 392, in granting a new trial the Court held that to "Sanction such a course would be to defeat the very purpose of the Court viz to dispense justice" and also in *State* v. *Halstead*, 73 Iowa 376 in granting a new trial held "He learns from his client the weak points of the case as well as the strong ones. Such knowledge carried by the recalcitrant attorney to the other side would be the sure means of defeat and injustice to the client. If attorneys are authorized after employment, to take retainers from the other side, the exercise of this authority would be the means of oppression through which clients could be coerced into payments of extortionate fees; and the profession of the law would be brought into disgrace by permitting those who pursue it to take advantage of the secrets of litigants obtained while the confidential relation of attorney and client existed."

The firm of Mautz, Souther, etc. has denied ever representing the appellants in this matter but the testimony of Mr. Moore of the firm of Mautz etc. is revealing (Tl. Tr. 76-80). Appellants petitioned the Supreme Court of Oregon for permission to introduce a bill from the firm of Mautz etc. requesting payment for their services in regard to the nondelivery of the deed to the property and a canceled check showing payment was made (R. Petition for Instructions and Ruling, Reply to Answer and Affidavit) but instead an order was entered on June 12, 1962, striking the petitions from the record.

It is submitted that the Decisions of the Oregon Courts to sanction the use of appellants' own attorneys against them fail d to recognize the basic rights of all American citizens to be granted a fair trial and that if this practice is allowed to continue that only chaos would be the result and this would be against public policy.

We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

HERBERT C. BARKER and
ELIZABETH S. BARKER,
5278 S. E. Hillwood Ave.,
Milwaukie 22, Oregon,
Defendants-Appellants in
Propria Persona

APPENDIX

PER CURIAM.

Defendants appeal from a decree which foreclosed plaintiff's mortgage on defendants' real property. The decree also awarded a deficiency judgment. Defendant Herbert C. Barker appeared at the trial of the case and defendant himself without the aid of counsel. A default decree and judgment was entered against Elizabeth S. Barker. Both Mr. and Mrs. Barker appeal.

There is no question of defendants' failure to perform the terms of the mortgage and of plaintiff's right to foreclose. The only issue is plaintiff's right to a deficiency judgment. At the trial and on appeal, defendants rely on allegations of misconduct on the part of plaintiff's attorneys for their defense to the plaintiff's demands. However, the charges of collusion and fraud are not limited to plaintiff's attorneys. Defendants have attempted to explain away every document involved in the transaction by accusations of fraud on the part of the other persons engaged in the transaction. The evidence does not support the charges in the least degree. Thre is nothing in this record which would avoid plaintiff's right to the relief it prayed for.

The trial judge was cautious to protect defendants' rights in every way. The trial was fair. Defendants' claim of error are without merit. The decree is affirmed.